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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Northwest Piping, Inc.

File: B-239404

Date: August 16, 1990

Paul S. Jacobsen, Esq., Briggs and Morgan, for the protester.
Alton Woods, Esq., Office of the Solicitor, Department of the Interior, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency's inadvertent inclusion of statement on solicitation's cover page that project is set aside for small businesses does not prohibit award to low, large business bidder where solicitation reasonably shows that the procurement was not intended to be set aside, and no bidder was prejudiced by erroneous statement.
2. Determination of Bureau of Indian Affairs that a firm meets eligibility criteria for responding to Buy Indian Act procurement will not be disturbed by the General Accounting Office where not shown to be unreasonable.

DECISION

Northwest Piping, Inc. protests the proposed award of a contract to Blaze Construction Co. by the Bureau of Indian Affairs (BIA), Department of the Interior, under invitation for bids (IFB) No. BIA-M00-90-09, for a road construction project on the Mescalero Indian Reservation in New Mexico. Northwest alleges that the proposed award is improper in light of the solicitation's cover page statement that "THIS PROJECT IS A SMALL BUSINESS SET ASIDE FOR 51% INDIAN-OWNED FIRMS," since, Northwest contends, Blaze is neither a small business concern nor a 51 percent Indian-owned firm.

We deny the protest.

The Commerce Business Daily (CBD) notice of BIA's requirement, published March 1, 1990, and the

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presolicitation notice, issued February 22, notified bidders that the procurement was restricted to 51 percent Indian-owned firms, but neither notice indicated in any way that the procurement was also set aside for small business concerns. Blaze, which certified in its bid that it is not a small business, submitted the low bid of \$266,109 at bid opening on April 4. Northwest, which certified that it is a small business, submitted the next low bid of \$272,543.50. Two other large businesses submitted higher priced bids. On April 6, Northwest filed an agency-level protest with the contracting officer against any proposed award to Blaze alleging that Blaze is not a small, 51 percent Indian-owned business. BIA denied that protest on April 16. Northwest filed its protest with our Office on April 24. BIA has advised us that it contemplates making an award to Blaze, but that it has withheld award pending our decision on the protest.

Northwest first contends that this procurement is set aside for small business concerns and that Blaze, a large business, is ineligible for award. The protester, a small business, seeks award as the only eligible bidder under the terms of the solicitation. Northwest maintains that it reasonably concluded that the IFB was set aside for small businesses because, besides the set-aside notation on the IFB's cover page, the solicitation includes the small business concern representation clause at Federal Acquisition Regulation (FAR) § 52.219-1 (FAC 84-56). Alternatively, Northwest contends it was prejudiced by the IFB's allegedly ambiguous language regarding the set-aside status of the procurement and claims that the IFB should be canceled and resolicited to eliminate the restriction. The protester asserts that if it had considered the procurement unrestricted as to size, Northwest could have negotiated subcontracts with large businesses, instead of small businesses, which could have possibly offered better prices. The protester also suggests that resolicitation would further competition because other potential large, Indian-owned bidders may have failed to bid because of the IFB's small business set-aside notation.

In response, the agency reports that the referenced small business set-aside statement was inadvertently included on the IFB's cover page and that Northwest should not have been misled because the restriction was inconsistent with other solicitation references, as well as the information provided in the CBD and presolicitation notices. BIA argues that the procurement was never intended to be set aside for small businesses and that such a set-aside would have been

improper under the Small Business Competitiveness Demonstration Program Act of 1988, 15 U.S.C § 644 note (1988), which directs the agency to solicit construction procurements in excess of \$25,000 (as well as services from certain other industry groups) on an unrestricted basis if the agency has attained its yearly small business participation goal for such procurements. Id. BIA principally contends that the solicitation, read as a whole, shows that the procurement is not a small business set-aside since, other than the inadvertent inclusion of the set-aside notation on the IFB's cover page, the IFB contains no size restriction language and is devoid of the regulatory provisions (e.g., FAR § 52-219-6 (FAC 84-48)) required for a set-aside procurement. As such, BIA considers the protested size restriction statement a harmless error since it is unsupported by the terms of the solicitation and not prejudicial to the bidders. The agency contends that resoliciting the requirement would serve no useful purpose.

We cannot find Northwest's reliance upon the small business set-aside notation on the cover page reasonable in light of the fact that no other IFB provision, agency notice, correspondence or action even remotely suggests that this procurement was set aside for small businesses. First, the CBD and presolicitation notices, acknowledged by Northwest, did not mention any size restriction. Second, the inclusion of the small business certification and standards, FAR § 52.219-1, does not establish a set-aside for small business concerns, since their inclusion is required in every solicitation when the contract is to be performed in the United States, its possessions or territories and certain other locations. FAR § 19.304(a) (FAC 84-56); see Nello Constr. Co., B-216731, Nov. 19, 1984, 84-2 CPD ¶ 543. When a solicitation is set aside for small business concerns, FAR § 19.508(c) (FAC 84-51) requires that the solicitation contain the "Notice of total small business set-aside" provision set forth in FAR § 52.219-6. That provision defines "small business concern" and unequivocally sets out the set-aside status of such a procurement. The IFB did not contain the small business set-aside notice.

Although Northwest contends that it was prejudiced because it provided only small business subcontractors, nothing in the express terms of the IFB precluded the protester from seeking large business subcontractor quotes in the

preparation of its bid.^{1/} We point out that even if the clause at FAR § 52.219-6 was considered part of the IFB, that provision expressly excepts a contractor from certifying that only small business end items will be provided in a construction contract. We conclude that the protester unreasonably relied upon an inadvertent, unsupported small business set-aside notation in the IFB.

Northwest next contends that Blaze is ineligible for award because it allegedly is not a 51 percent Indian-owned firm, as required by the IFB, which was set aside for such concerns pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1988). Although Northwest concedes that the sole owner of Blaze is a one-eighth Blackfoot Indian, the protester alleges that in the past, Blaze may have been susceptible to control by other, non-Indian, individuals. In support of its contentions, Northwest provides a transcript of congressional testimony given by the owner of Blaze in 1988, about certain joint venture agreements entered into in prior years between Blaze and other individuals for the purpose of obtaining performance bonds necessary for particular construction projects upon which Blaze competed. Northwest contends that Blaze was obligated to pay substantial amounts of money to these sureties, and possibly could have been subject to third party control. In this regard, the protester argues that Blaze cannot be considered a legitimate Indian-owned firm because it diverted so much of its profits to others, it does not meet the IFB's Buy Indian requirement that a majority of the firm's earnings accrue to the business' Indian owners.

BIA disputes Northwest's contentions and has determined that Blaze is eligible for award. The agency points out that the testimony does not show how the ownership of Blaze was affected by others and that the management of Blaze has been maintained by its Indian owner at all times. BIA also argues that the specific joint venture agreement took place several years ago for a separate construction project and is not relevant here. BIA asserts that Northwest has not shown that ownership or control of Blaze was ever relinquished to a non-Indian individual or firm. It states that the payment of large sums of money to another in order to acquire necessary performance bonds was merely a business

^{1/} As to Northwest's argument that award under the IFB would be improper because other large businesses may have been excluded from the competition, we do not find that the protester, a small business, is the appropriate party to raise this issue. See Priscidon Enters., Inc., B-238370, Mar. 30, 1990, 90-1 CPD ¶ 345.

determination by Blaze and does not show that the majority of the firm's earnings accrued to any individual other than the Indian owner of the firm. BIA states that a 1987 preaward audit confirmed that Blaze was a 51 percent Indian-owned firm and that no information since that time has caused BIA to change its determination. The agency notes that Blaze certified in its bid that it currently is a qualified Indian firm and that Blaze is obliged to inform the agency of any information regarding a change in such status.

The Secretary of the Interior has broad discretionary authority to implement the Buy Indian Act, and we have held that defining the criteria a firm must meet to qualify as an Indian enterprise, and the quantum of evidence required to establish compliance with the criteria, falls within that broad discretion. Northwest Piping, Inc., B-232644, Jan. 23, 1989, 89-1 CPD ¶ 53. Our examination in this area, therefore, is limited to the reasonableness of such decisions.

Based upon the record before us, we have no reason to question the reasonableness of BIA's determination that Blaze is eligible for award here as a 51 percent Indian-owned firm. Blaze properly certified in its bid, under penalty of law, that it is an eligible Indian-owned firm. We agree that the congressional testimony by Blaze's owner regarding past joint venture agreements shows that Blaze may have been subjected to paying rather high monetary fees to obtain past performance bonds. This information, regarding business agreements made approximately 5 and 7 years ago, concerning a limited number of past construction projects, does not establish that Blaze currently does not qualify as an Indian-owned firm or that the agency's Buy Indian eligibility determination was unreasonable.

The protest is denied.



James F. Hinchman
General Counsel